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IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND STEPHEN GOLDSMITH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

LIST OF PARTIES

All of the parties to the proceedings in the court below are included in the caption on the cover page of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Indianapolis, Indiana, and Stephen Goldsmith, in his official capacity as Mayor of the City of Indianapolis, Indiana, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported 183 F.3d 659. The opinion of the district court (Pet. App. 24a-48a) is reported at 38 F.Supp.2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. A timely petition for rehearing was denied on August 18, 1999. Pet. App. 51a-52a. On November 1, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 16, 1999. *See* Application No. 99A356. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States, made applicable to the States by the Due Process Clause of the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

1. In August 1998, the Indianapolis Police Department (IPD) began operating a "checkpoint" program. Under that program, motorists were briefly stopped and examined in order to determine whether they were impaired and whether their driving documentation was in order. A major goal of those checkpoints was to discover narcotics traffickers—ordinarily, by walking a drug detection dog around the perimeter of a stopped car while the motorist's documentation was being checked—and thus to interrupt the flow of illegal narcotics through Indianapolis. Pet. App. 25a-27a.

The checkpoint program was administered in accordance with written procedures promulgated in advance by the IPD. Pet. App. 26a-27a. The locations of the checkpoints were selected weeks in advance by IPD supervisors (or more senior personnel) "based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which [would] minimize the interference with normal traffic flow * * *." *Id.* at 56a. Drivers approaching each of those pre-determined locations were warned, with lighted signs, that they should be prepared to stop for a "narcotics checkpoint" and that a "narcotics K-9" would be in use. *Id.* at 57a. Moreover, only a pre-determined number of cars approaching a given checkpoint location was stopped. All other traffic was permitted to continue without interruption until the last of the vehicles initially stopped was processed.

Once the last of the initially stopped cars left, a new group of motorists (the same predetermined number) was stopped. No deviations from that procedure were permitted. *Id.* at 29a, 57a.

Each motorist who was stopped at a checkpoint was approached by police officers, at least one of whom was in full uniform. An officer asked for, and examined, the motorist's driver's license and motor vehicle registration. The officer also looked for any signs of impairment, such as alcohol odors, slurred speech or disorientation. Pet. App. 27a. While the motorist's documentation was being checked, a drug detection dog was walked around the perimeter of the car. *Id.* at 57a. If the motorist's documentation proved to be in order, and there was no cause for any further detention (such as signs of impairment, a positive dog "alert," or the discovery of outstanding warrants), the motorist was allowed to proceed without further delay. *Id.* at 57a. The City endeavored to operate the checkpoints so that no motorist was stopped for more than five minutes (unless grounds for a longer detention were discovered during the stop). The average stop lasted only two to three minutes. *Id.* at 28a, 57a.

The City conducted six roadblocks, in accordance with its program, between August and November 1998. In total, 1,161 vehicles were stopped and 104 motorists were arrested—an effectiveness or "hit" rate of 9%. Those arrests were divided approximately equally between narcotics offenses (55 arrests) and other crimes (49 arrests). Pet. App. 3a.

2. Respondents Edmond and Palmer, who each alleged that he had been illegally stopped at one of the City's roadblocks, commenced the instant action, on be-

half of themselves and other similarly situated motorists, in the United States District Court for the Southern District of Indiana. Respondents alleged that the City had "violated the Fourth Amendment by using roadblocks to seize motorists without individualized suspicion for the primary purpose of determining if they possess or are under the influence of illegal drugs." Pet. App. 32a. They sought an injunction prohibiting further use of the checkpoints. *Id.* at 25a.

The parties stipulated to the material facts surrounding the operation of the roadblocks (Pet. App. 26a-27a & n.2), and also stipulated that the case should be certified as a class action on behalf of all motorists subject to being stopped at roadblocks "maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use." *Id.* at 30a. The district court certified the proposed class pursuant to Fed. R. Civ. P. 23(b)(2), but it denied respondents a preliminary injunction on the ground that the City's roadblock program is clearly constitutional under the Fourth Amendment. Pet. App. 34a-48a.

The district court first concluded that the constitutionality of the roadblocks should be analyzed under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979), and it expressly rejected respondents' contention that any balancing of the interests implicated by a stop is permissible only when the government demonstrates a "special need" beyond the ordinary need to enforce the criminal laws. Pet. App. 34a. The court explained that in upholding the constitutionality of sobriety checkpoints, this Court held that no such showing is required in "'cases dealing with police stops of motorists on

public highways.'" *Id.* at 34a-35a, quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

Turning to the balance of interests involved, the court concluded that the City's interest in interdicting narcotics users and traffickers not only is "beyond serious dispute" but also—given the sizable proportion of arrests—is significantly advanced by the checkpoints. Pet. App. 35a-36a. With respect to the intrusion on individual motorists, the court noted that law-abiding motorists clearly would know that the stops are officially authorized, and thus would not be unduly alarmed by them, and that the IPD's guidelines adequately restrict the discretion conferred on law enforcement officers. *Id.* at 36a-38a. The court also concluded that detaining a motorist briefly to check his license and registration "is fairly non intrusive," and that any intrusion from "having a dog sniff the exterior of a motorist's vehicle," though "warrant[ing] a closer look," is "similar to that of an officer looking for contraband in plain view." *Id.* at 39a-40a. "Overall," the court concluded, "the checkpoints * * * are targeted effectively and limited sufficiently to combat the city's drug crisis with minimal intrusion on motorists." *Id.* at 40a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-24a. Writing for the majority, Judge Posner began by noting that "[t]he legality of drug roadblocks has divided the other courts that have been asked to decide the issue." *Id.* at 2a (citing conflicting federal and state case law). Moreover, Judge Posner conceded that if "reasonableness is to be assessed at the level of the entire program," rather that at the level "of the individual stop," then "these roadblocks probably are

legal, given the high 'hit' rate and the only modestly intrusive character of the stops." *Id.* at 3a.

Judge Posner believed, however, that an analysis focusing on the reasonableness of the roadblock program would be incorrect, because "courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement." Pet. App. 4a. Because the City's program was aimed at law enforcement and was "meant to intercept a completely random sample of drivers," and because "there is neither probable cause nor articulable suspicion to stop *any* given driver," the program was unconstitutional—at least absent some "urgent considerations of public safety," such as having reason to believe that "a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis." *Id.* at 6a. The City's failure to establish "such urgency," Judge Posner concluded, required the City to comply "with the normal principles constraining law enforcement." *Ibid.*

Judge Posner acknowledged that this Court has upheld "roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs," Pet. App. 7a, citing *Sitz*, "and roadblocks designed to intercept illegal immigrants," *ibid.*, citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). He concluded, however, that sobriety checkpoints are permissible because they are not concerned "primarily with catching crooks," but are instead "designed to protect other users of the road from the dangers posed by drunk drivers." Pet. App. 8a. Roadblocks to intercept illegal immigrants are sui generis, Judge Posner believed, because they "depend ultimately on

sovereign powers over foreign relations, foreign commerce, citizenship, and immigration." *Id.* at 9a.

Finally, Judge Posner also acknowledged that the City's program "often discover[s] violations of the traffic laws," and that stopping motorists would be constitutional "[i]f the purpose of the roadblock program were to discover such violations." Pet. App. 10a. But he concluded that the City's roadblock program cannot be upheld on that basis, because "purpose * * * is critical to * * * legality," and the City's use of a narcotics dog as part of the program "shows—what is anyway not contested—that the purpose of the roadblocks is to catch drug offenders." *Id.* at 10a-11a. Judge Posner suggested that the situation might well be different "if the primary purpose were to detect drunken drivers," because in that case "the dog could be added to the roadblock * * * on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible." *Id.* at 11a. He also left open whether the City's roadblock program might be upheld "on a fuller record," on a showing that the narcotics problems facing Indianapolis are on a par with Judge Posner's hypothetical "dynamite terrorist." *Id.* at 12a-13a.

Judge Easterbrook dissented. Pet. App. 13a-23a. Judge Easterbrook first rejected the majority's view that this Court's cases permit a roadblock program only where the roadblocks are not intended to enforce the criminal laws, noting that "*Martinez-Fuerte* approved a roadblock to search for alien smuggling, a violation of a criminal law," and that "*Sitz* approved a roadblock to search for drunk driving, a violation of a criminal law." *Id.* at 13a. Judge Easterbrook also rejected the majority's focus "on the 'primary' or 'real' motive for the

roadblock," explaining that this Court has repeatedly held that the inquiry under the Fourth Amendment is "objective." *Id.* at 13a-14a. Thus, "[s]o far as the fourth amendment is concerned, there is no difference between a roadblock originally designed to catch drug peddlers and also used to catch drunk drivers, and a roadblock originally designed to catch drunk drivers and also used to catch drug peddlers." *Id.* at 15a-16a.

Judge Easterbrook also noted that neither *Sitz* nor *Martinez-Fuerte* used the majority's analytical approach, but that instead both cases balanced the "slight" intrusion resulting from a roadblock against the success of the roadblock—so long as the officers' discretion is adequately constrained by objective guidelines. Pet. App. 18a-20a. Here, he noted, "Indianapolis was at pains to establish a rigorous protocol for its stops. Roadblocks are fixed; the number of cars selected for inspection is fixed; the procedure following a stop is fixed." *Id.* at 20a. Finally, he rejected the majority's characterization of *Martinez-Fuerte* as a case exemplifying "a 'border exception' or 'immigration exception' to normal fourth amendment principles * * *." *Id.* at 21a. He noted that "[t]he checkpoints [in that case] were between 65 and 90 miles inland," that the Court balanced the interests involved without suggesting "that enforcement of this body of laws should be especially easy," and that "[e]verything the Court wrote about the checkpoints in *Martinez-Fuerte* can be said about the roadblocks in Indianapolis." *Id.* at 20a-21a.

4. The City sought rehearing and suggested the appropriateness of rehearing the case en banc. The petition was denied, but Judge Easterbrook issued the following statement (Pet. App. 50a, n. *):

> The question presented by this case is an important and recurring one, but I have not called for a vote on the petition for rehearing en banc. The court's opinion shows that a conflict among the circuits (and state courts) preexisted the panel's opinion, and it would be pointless to sit en banc just to consider moving from one side of that conflict to another. Only a higher court can give a definitive answer.

REASONS FOR GRANTING THE WRIT

I. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided Regarding The Constitutionality Of The Fixed Checkpoints At Issue Here

As every judge who participated in the decision below recognized, the lower courts are deeply divided over the constitutionality of roadblocks used to detect narcotics use and trafficking. Indeed, in *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), the Eleventh Circuit upheld a Florida program that is legally indistinguishable from that adopted by the City of Indianapolis, and did so precisely on the reasoning rejected by the Seventh Circuit in this case.

In *Merrett,* Florida law enforcement officials adopted a roadblock program that concededly was intended to intercept narcotics traffickers. As here, the checkpoints were clearly marked with traffic control devices (such as traffic cones or flashing lights) and warning signs. 58 F.3d at 1549. As here, officers stopped passing traffic, checked for safety defects, and examined each driver's license and registration. *Ibid.* As here, stopped vehicles were sniffed by a narcotics dog while the driver's

documentation was being checked, and "most people experienced only a slight delay" in the process. *Ibid.*

The Eleventh Circuit rejected the claims of unconstitutionality advanced by a class of motorists subjected to the stops, including the claim that "the operation was an invalid pretextual seizure" because "Florida conducted the roadblock operation at issue for the purpose of exposing the cars to the drug sniffing dogs." *Id.* at 1550. The court explained:

> That the chief (but not the sole) purpose of the roadblocks in this case was to intercept drugs is undisputed. That the state had the authority to conduct roadblocks to check drivers' license[s] and vehicle registration[s] is also undisputed. We conclude that, where the state has one lawful purpose sufficient to justify a roadblock, that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional.

Id. at 1550-51. Unlike the Seventh Circuit in this case, the Eleventh Circuit "adopt[ed] a totally objective rule: a state may conduct a mixed-motive roadblock as long as one purpose presented for the roadblock could validly justify the roadblock, *even if no roadblock would have been put in place but for the state's desire to hunt for unlawful drugs*." *Id.* at 1551 (emphasis added);[1] *see*

[1] Given that the license and registration roadblocks themselves were constitutional, the Eleventh Circuit rejected the proposition that the use of a narcotics dog "without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search." 58 F.3d at 1553. The court explained that a canine sniff is not a Fourth Amendment search, *ibid.*, citing *United States v. Place*, 462 U.S. 696 (1983), and that "[s]o long as

also United States v. Holloman, 113 F.3d 192, 195 (11th Cir. 1997) (reaffirming circuit rule that if "the * * * detention stemmed from a roadblock, the pretextual nature of the interdiction operation would not have offended the Fourth Amendment").

The Seventh Circuit's ruling also conflicts with the decision of the Supreme Court of North Dakota in *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), where that court upheld a roadblock in which officers checked stopped vehicles for safety violations, even though it was conceded that "the primary purpose of the checkpoint was to look for controlled substances." *Id.* at 700. As the Supreme Court of North Dakota saw it, consideration of the alleged "true" interest behind the roadblock did not invalidate the roadblock as "pretextual" but instead *strengthened* the case for its legality, by giving the State *two* important interests to balance against "the interference with individual liberty caused by the checkpoint." *Id.* at 700-01. Because the State unquestionably had "a vital interest in eradicating the problem of narcotics trafficking," and also "in ensuring that vehicles on its roads are safe for operation, and that licensing requirements are being observed" (*id.* at 701), and given the "minimal" intrusion on individual liberty occasioned by the roadblock (*id.* at 702), the court had no difficulty concluding that the "checkpoint did not violate the Fourth Amendment." *Id.* at 703.

[Footnote continued from previous page]

the use of the dogs did not make the delay caused by the roadblocks unreasonable * * * the state's decision to use dogs at the roadblocks does not make the operation unconstitutional." *Ibid.*

Finally, as the Seventh Circuit also conceded (Pet. App. 2a), the decision below conflicts with the ruling of the Supreme Court of Missouri in *State v. Damask*, 936 S.W.2d 565 (Mo. 1996). In *Damask*, officers conducting the roadblocks checked drivers' licenses and vehicle registrations (*id.* at 568), and also attempted to identify drug traffickers who might be using the roads (*ibid.*). Applying the *Brown v. Texas* balancing test (*id.* at 571 & nn. 14-15), the court upheld the checkpoints against a Fourth Amendment challenge (as did the district court in this case) by relying *solely* on the State's interest "in interdicting drug trafficking"—an interest that the court noted was "beyond serious dispute." *Id.* at 571. Indeed, the court rejected precisely the argument accepted by the Seventh Circuit in this case—*i.e.*, that a checkpoint must "promote a government interest separate from that of general law enforcement"—explaining that such a view cannot be squared with *Martinez-Fuerte*, which upheld a checkpoint designed to interdict illegal aliens. *Martinez-Fuerte*, the court believed, strongly supported the constitutionality of the checkpoint, because "[t]he flow of illegal drugs presents a law enforcement problem easily as important as that posed by the passage of illegal aliens into this country." 936 S.W.2d at 572.

Other federal and state courts, by contrast, have reached conclusions in line with the analysis adopted by the Seventh Circuit in this case. Although the Tenth Circuit ordinarily holds that "a brief stop at a highway roadblock for the limited purpose of verifying a driver's license, registration, and proof of insurance is a reasonable intrusion into the lives of drivers and their passengers even in the absence of reasonable suspicion,"

United States v. Galindo-Gonzales, 142 F.3d 1217, 1221 (10th Cir. 1998), that court, like the Seventh Circuit, attaches controlling significance to "whether the primary reason for the roadblock [is] to check the driver's license or to check the vehicle for drugs." *United States v. Morales-Zamora*, 974 F.2d 149, 152 (10th Cir. 1992). If the "primary reason" turns out to be the latter, as the Tenth Circuit held in suppressing a large quantity of narcotics seized during a roadblock, "it follows that the stop [is] pretextual and all that occurred thereafter [is] tainted." *Id.* at 153; *see also United States v. McFayden*, 865 F.2d 1306, 1312 (D.C. Cir. 1989) (suggesting that otherwise lawful roadblock may be held invalid if it is "a subterfuge").

The Sixth Circuit has expressly agreed with the Tenth Circuit's analysis on this point, *United States v. Huguenin*, 154 F.3d 547, 554-55 (6th Cir. 1998), and has equally clearly rejected the contrary views of the Eleventh Circuit. *Id.* at 553 ("Although the Eleventh Circuit in *Merrett* held that mixed-motive checkpoints are lawful as long as at least one of the underlying purposes * * * is legitimate, * * * we do not agree with its reasoning"); *see id.* at 563 (Kennedy, J., dissenting) ("I agree with the Eleventh Circuit * * *.").[2] The same

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[2] In *United States v. Ramirez-Gonzalez*, 87 F.3d 712 (5th Cir. 1996), the Fifth Circuit considered the validity of stopping motorists for what was labeled a "drug interdiction checkpoint." The defendant, who was arrested at the checkpoint because he was smuggling illegal aliens, contended that the sole purpose of the checkpoint had been to interdict drugs, and that such a purpose made the checkpoint unreasonable under the Fourth Amendment. The government contended that the checkpoint had been based instead "on general crime prevention concerns." *Id.* at 715-16.

or similar reasoning—invalidating roadblocks because of their purportedly pretextual nature—is found in the decisions of several State courts and local courts. *See, e.g.*, *Galberth v. United States*, 590 A.2d 990, 997 (D.C. 1991) ("it is clear that the police may not use a roadblock in order to seek evidence of drug-related crimes"); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. App. 1990); *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga. 1998).

That division of authority warrants this Court's review. The lower federal and state courts have by now fully considered the implications of all arguably pertinent decisions of this Court, and have nonetheless failed to reach accord on this important issue. In fact, the Seventh Circuit's decision in this case deepens even more that division of authority among the lower courts, which now seems certain never to abate absent this Court's intervention. This Court's review is, therefore, urgently needed to restore uniformity to this important area of federal law.

[Footnote continued from previous page]

The Fifth Circuit agreed with the defendant that a determination of "the primary purpose of" the checkpoints was essential to the constitutional analysis, and it remanded for an evidentiary hearing to establish that "primary purpose." *Id.* at 716. That inquiry would, of course, be wholly unnecessary if the Fifth Circuit agreed with the Eleventh Circuit's view that, because it is sufficient for a roadblock's legality that the detention be supported by *any* lawful aim, a court need not even consider whether a "pure" narcotics roadblock comports with the Fourth Amendment. Nor, of course, would that inquiry be necessary if the Fifth Circuit agreed with the Supreme Court of Missouri that a "pure" narcotics roadblock is in any event constitutional.

II. The Decision Below Is Inconsistent With This Court's Fourth Amendment Precedents

The Seventh Circuit's conclusion that this Court's cases foreclose a roadblock intended to enforce criminal laws, and that this Court instead invariably has required a "'special need' based on 'concerns *other than crime detection*,'" Pet. App. 5a (emphasis in original; citations omitted), before dispensing with a requirement of individualized suspicion was squarely rejected by this Court in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). *Sitz* made clear that no such "special needs" must be shown in "cases dealing with police stops of motorists on public highways." *Id.* at 450.

To the contrary, this Court has repeatedly applied a balancing test to assess the validity under the Fourth Amendment of checkpoint stops, and has repeatedly suggested that routine license-and-registration checkpoints are valid under that approach. Because this Court also has emphasized time and again that Fourth Amendment requirements are purely objective, the Eleventh Circuit correctly determined in *Merrett* that roadside checkpoints are lawful if conducted pursuant to a neutral program that directs officers to check motorists' licenses and vehicle registrations, even if those checkpoints would not, in fact, be conducted absent the desire to seek out drug offenders. For that reason alone, the Seventh Circuit's decision must be reversed. Moreover, even if it were necessary to consider in the analysis the City's "purpose" in ferreting out narcotics offenders, that additional interest would strengthen the case for the legality of the checkpoints.

1. It is common ground that a stop that occurs at a roadblock conducted pursuant to Indianapolis' program

is a "seizure" within the meaning of the Fourth Amendment. The Fourth Amendment, however, "does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989). In determining the "reasonableness" of a seizure, courts must balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas,* 443 U.S. 47, 50-51 (1979); *see also Maryland v. Wilson*, 519 U.S. 408, 411-12 (1997); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). A seizure satisfies that balance of interests if it is "based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual *or* [if it is] carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. at 51 (citations omitted) (emphasis added).

2. This Court has repeatedly applied those principles to uphold a variety of fixed automobile roadblocks on public roads. Thus, in *Martinez-Fuerte, supra*, the Court upheld the stopping of motor vehicles at two fixed checkpoints located, respectively, on highways that were 66 and 90 miles north of the Mexican border. *Martinez-Fuerte*, 428 U.S. at 545, 549. On one side of the balance, the Court found that the checkpoints—at which motorists were detained for brief questioning to determine whether illegal aliens were on board—served the "substantial[]" governmental interest in preventing the use of the highways by alien smugglers

and illegal aliens. *Id.* at 556-57. On the other side of the balance, the Court emphasized that an individual's "expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte*, 428 U.S. at 561; *see also New York v. Class*, 475 U.S. 106, 112-14 (1986) (emphasizing pervasive regulation of automobiles and resulting diminished expectation of privacy enjoyed by motorists); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (same).

Indeed, *Martinez-Fuerte* noted that the "practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Martinez-Fuerte*, 428 U.S. at 560-61 n.14. Thus, in light of the "[t]he regularized manner in which established checkpoints [were] operated," which gave "visible evidence, reassuring to law-abiding motorists, that the stops [were] duly authorized and believed to serve the public interest," the Court had little difficulty in concluding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by a warrant." *Id.* at 559, 566.

Three years after deciding *Martinez-Fuerte*, the Court struck down a police practice of *random* stops of vehicles to check drivers' documents in *Delaware v. Prouse*, 440 U.S. 648 (1979). The Court conceded that "[s]tates have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle

inspection requirements are being observed." *Prouse*, 440 U.S. at 658. The Court concluded, however, that Delaware's use of discretionary spot checks invaded significant privacy interests, because the State had granted "unbridled discretion [to] law enforcement officers." *Ibid.* Such discretionary random stops, the Court explained, were likely to produce fear and anxiety in the detained individual, and were therefore unlike the checkpoints at issue in *Martinez-Fuerte*: "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Prouse*, 440 U.S. 657 (quoting *Martinez-Fuerte*, 428 U.S. at 558).

The Court emphasized in *Prouse* that it did not mean to preclude "States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Prouse*, 440 U.S. at 663. In particular, the Court suggested that there would be no Fourth Amendment defect in a practice of "[q]uestioning * * * all oncoming traffic at roadblock-type stops." *Id.* at 663; *see also id.* at 664 (Blackmun, J., concurring) ("The roadblock stop for all traffic is given as an example. I necessarily assume that [it] includes other not purely random stops (such as every 10th car to pass a given point) * * *."). Indeed, the validity of routine fixed roadblocks was confirmed by *Texas v. Brown*, 460 U.S. 730 (1983), in which the defendant had been stopped at "a routine driver's license checkpoint" in the City of Fort Worth, Texas *Id.* at 733. The four-Justice plurality noted that the lower court, though granting relief to the defendant on the ground that the officer violated the Fourth Amendment *after* the

initial stop by seizing evidence not in "plain view," had not "question[ed] the validity of the officer's initial stop of [the] vehicle as part of a license check.'" *Id.* at 739. Citing *Prouse*, the plurality expressly "agree[d]" with that conclusion. *Ibid.* No Justice took issue with the plurality's characterization of the "license checkpoint" as a lawful traffic roadblock.[3]

Most recently, in *Sitz*, *supra*, the Court rejected a Fourth Amendment challenge to a sobriety checkpoint policy under which all vehicles arriving at a pre-determined location would be stopped and their drivers examined for signs of intoxication. 496 U.S. at 447. The Court emphasized "the magnitude of the drunken driving problem and the States' interest in eradicating it." *Id.* at 451. The Court also noted that "[c]onversely, the weight bearing on the other side of the scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight." *Ibid.* In fact, the Court could "see virtually no difference" in "the levels of intrusion on law-abiding motorists" caused by sobriety and alien-smuggling checkpoints, whether viewed in terms of the "objective" intrusion (measured by the duration of the seizure and the intensity of the investigation) or in terms of the "subjective" impact on law abiding motorists (measured by the potential for generating unwarranted fear and surprise). *Id.* at 451-53. In either case, the Court concluded, "the intrusion

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[3] In fact, the disposition for which each concurring Justice voted (*i.e.*, reversal of the judgment that had been rendered in the defendant's favor) necessarily assumed the correctness of the plurality's threshold determination that the initial seizure of the defendant at the "license roadblock" had been lawful.

resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops * * * upheld in *Martinez-Fuerte*." *Id.* at 453.

2. Taken together, *Martinez-Fuerte*, *Prouse*, *Texas v. Brown*, and *Sitz* leave no doubt that a program of checkpoints in which motorists are stopped and examined for signs of impairment while their driving documentation is checked by police officers is clearly constitutional, so long (as was the case with the City's program) as the individual officers' discretion is adequately constrained by neutral objective criteria. It is equally clear under this Court's cases that a canine sniff of a lawfully stopped car is not a "search" that is subject to independent Fourth Amendment inquiry. *United States v. Place*, 462 U.S. 696 (1983). Yet the Seventh Circuit added those two wholly permissible acts to produce a Fourth Amendment violation, because it ascribed to this Court a concern with the "primary purpose" of a stop that in the Seventh Circuit's view rendered the City's program impermissible. That reasoning is clearly erroneous.

This Court has consistently held that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's state of mind at the time the challenged action was taken. *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). Based on that principle, the Court has repeatedly held that the government's motivation or intent is irrelevant in a variety of Fourth Amendment contexts. *See, e.g.*, *Whren*

v. United States, 517 U.S. 806, 813 (1996) (allegedly pretextual traffic stop); *Horton v. California*, 496 U.S. 128, 137-38 (1990) ("plain view" seizures); *Graham v. Connor*, 490 U.S. 386, 397-99 (1989) (amount of force needed to effect arrest); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3 (1983) (allegedly "pretextual" boarding of vessel). As this Court recently stated, "'the fact that [a police] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action so long as the circumstances, viewed objectively, justify that action.'" *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 138).

The Seventh Circuit, however, believed that this Court had as much as held in *Texas v. Brown*, *supra*, that the Fourth Amendment "would be violated if 'the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in plain view in the course of a check for drivers' licenses.'" Pet. App. 7a, quoting *Texas v. Brown*, 460 U.S. at 743. But the passage of the plurality's opinion in *Texas v. Brown* on which the Seventh Circuit relied not only was dictum but also did not concern the lawfulness of the stop as such; the Court was addressing whether the requirements of the "plain view" doctrine had been established. At the time this Court decided *Texas v. Brown*, the Court had not yet discarded the view that the "plain view" doctrine required that evidence be found "inadvertently." Thus, the plurality's suggestion that the existence of a "pretext" might present a different case merely distinguished a situation in which that "inadvertence" requirement would not be met. Ironically, the Seventh Circuit failed to note that when this Court finally discarded the "in-

advertence" requirement in *Horton, supra,* it explained that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer."

Because the Seventh Circuit plainly misconstrued this Court's cases assessing the relevance of governmental "purpose" to the lawfulness of traffic stops, the court's ruling can be reversed on the limited ground adopted by the Eleventh Circuit in *Merrett*: that the City's program, objectively considered, is a permissible check of motorists' documentation and sobriety, and that, whatever the City's motivation in providing for a canine sniff of stopped vehicles, that sniff invades no separate Fourth Amendment interest.

3. In any event, consideration of the City's "purpose" in interdicting illegal drugs contributes to, rather than detracts from, the overall reasonableness of the City's program. As *Sitz* makes clear, motorists experience only a "slight" intrusion when they are stopped for a few minutes at a fixed highway checkpoint, and in fact there is "virtually no difference" from the motorists' point of view between a sobriety checkpoint and a checkpoint designed to ferret out smugglers. *Sitz*, 496 U.S. at 451-52. The other side of the scale, however, tips even more decidedly in the City's favor when its interest in interdicting narcotics smugglers is added to the balance.

The public interest in detecting the transportation of narcotics on the highways is compelling. Drug trafficking is "one of the greatest problems affecting the health and welfare of our population," *NTEU v. Von Raab*, 489 U.S. 656, 668 (1989), and it has caused a

"'veritable national crisis in law enforcement.'" *Ibid.*, quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). "[T]hrough the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs." *Von Raab*, 489 U.S. at 669. Indeed, the government's need for the aid provided by checkpoints is particularly compelling in the case of drug smuggling. Smuggling, whether of aliens or of narcotics, is a crime of stealth, requiring only concealment and escape for its successful completion. Thus, it is rarely practical to develop reasonable suspicion that any particular automobile is carrying contraband, "because the flow of traffic tends to be too heavy to allow the particularized study of a given car * * *." *Martinez-Fuerte*, 428 U.S. at 557. Yet, as demonstrated by the high "hit rate" produced by the City's program, there is ample reason to believe, as even the Seventh Circuit conceded, that narcotics smuggling on some of the City's roads "approaches epidemic proportions." Pet. App. 12a. The City's interest in eradicating that "epidemic" vastly exceeds any negligible additional inconvenience that motorists may suffer as a result of the City's decision to add a narcotics dog to a roadblock that otherwise is plainly lawful.

III. The Question Presented Is An Important And Recurring One, And Immediate Review Is Essential In Order To Provide Guidance to Law Enforcement And Avoid Wasteful Litigation

This case raises a question of substantial importance—and one that already has been exhaustively litigated in the lower courts—concerning the ability of

law enforcement officers to detect dangerous contraband on public highways. The Seventh Circuit's opinion not only invalidated a concededly effective roadblock program, but did so on the basis of reasoning that departs from the decisions of other lower courts and offers little guidance to policy-makers or law enforcement officers who may be called upon to craft effective alternatives. The Seventh Circuit's ruling also offers little help to the citizenry, who are left to wonder whether officers conducting seemingly routine highway checkpoints in fact possess the constitutional authority to stop motorists.

As the Seventh Circuit sees it, the answers to those questions depend on whatever "purpose" may later be found by a court to have dominated the individuals who devised the roadblock. If the dominant "purpose" is to enforce the criminal laws, the roadblock will almost certainly be found to violate the Fourth Amendment, unless the government can bring itself within a newly-minted Fourth Amendment "exception" of uncertain provenance or scope. That "exception," which the Seventh Circuit could describe no better than by example (the hypothetical "terrorist" driving toward downtown with a car full of dynamite, Pet. App. 6a, 12a), may be available when application of "the normal principles constraining law enforcement" would amount to carrying out a "suicide pact." *Id.* at 6a.[4] It is mani-

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[4] The Seventh Circuit stated that its ruling on the legality of the City's program was "necessarily tentative," because the district court decided the case "on a very skimpy stipulation of facts." Pet. App. 2a. The court did not explain, however, what additional "facts" that it believed relevant to the Fourth Amendment inquiry

fest that neither the government nor the citizenry profits from so impressionistic a doctrine. This Court's review is needed to restore to highway roadblocks the objective standards of conduct that, as experience has taught, best promote "evenhanded law enforcement." *Horton*, 496 U.S. at 138.

Immediate review of the important and recurring question presented by this case is particularly appropriate here, because the alternative is to leave in place a rule of law that not only will have a significant adverse effect on prosecutions stemming from the City's roadblocks, but also on criminal cases throughout the Seventh Circuit in which evidence has been seized as a result of roadblocks that now may be subject to challenge under the decision below. Moreover, because

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[Footnote continued from previous page]

were missing from the stipulated record, and accordingly provided no guidance for any subsequent factual development on remand. The court's reference to the absence of additional "facts" evidently was meant only to keep open the possibility that the City might attempt to show on remand that narcotics smuggling is sufficiently serious to meet the Seventh Circuit's ill defined "terrorist/suicide-pact" exception. *See id.* at 12a-13a. But the precise gravity of the drug epidemic or any other governmental justification for a checkpoint is a question of "legislative fact," which should be decided alike in all cases involving "narcotics checkpoints." It is not an issue of "adjudicatory fact," on which courts in different parts of the country should be permitted to reach conflicting conclusions solely because of the particular record concerning the seriousness of the problem that was assembled by individual litigants. *See generally* Kenneth Karst, *Legislative Facts in Constitutional Litigation* 1960 Sup. Ct. Rev. 75, 82-86. Indeed, this Court's cases *already* establish that the drug epidemic is a problem of the utmost gravity. *See, e.g., Von Raab*, 489 U.S. at 668.

the Seventh Circuit's decision now renders "narcotics roadblocks" almost always impermissible in states within that court's jurisdiction, public officials and police officers who henceforth may be found to have planned or executed such a roadblock may be held liable in damages for conduct that is perfectly lawful in other parts of the country. The threat of such liability will unduly deter the work of those upon whom the public depends for its safety. Review by this Court is warranted to restore predictability and rationality to the rules that guide those officers and the citizenry in what was, until the decision below, a routine interaction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

James EDMOND and Joell Palmer, on their own behalf and on behalf of a class of those similarly situated, Plaintiffs-Appellants,

v.

Stephen GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; City of Indianapolis, Indiana; and Unknown Members of the Indianapolis Police Department, Defendants-Appellees.

No. 98-4124.
United States Court of Appeals,
Seventh Circuit.
Argued April 12, 1999.
Decided July 7, 1999.

Motorists brought class action against city, mayor, and members of police department, alleging that drug interdiction checkpoints violated Fourth Amendment. The United States District Court for the Southern District of Indiana, Sarah Evans Barker, Chief Judge, 38 F.Supp.2d 1016, denied motorists' motion for preliminary injunction. Motorists appealed. The Court of Appeals, Posner, Chief Judge, held that police roadblocks intended to catch drug offenders violated Fourth Amendment.

Reversed.

Easterbrook, Circuit Judge, dissented and filed opinion.

Kenneth J. Falk (argued), Indiana Civil Liberties Union, Indianapolis, IN, for Plaintiffs-Appellants.

Stephen Carter, Office of the Corporation Counsel, City Counsel Legal Division, Indianapolis, IN; Thomas E. Satrom

(argued), Office of Corporation Counsel, Indianapolis, IN, for Defendants-Appellees.

Before POSNER, Chief Judge, and EASTERBROOK and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge.

A class action has been brought to enjoin the City of Indianapolis from setting up roadblocks to catch drug offenders, a practice that the plaintiffs claim violates the Fourth Amendment. The plaintiffs' motion for a preliminary injunction was denied on the ground that the City's practice is lawful, precipitating this interlocutory appeal under 28 U.S.C. § 1292(a)(1). The legality of drug roadblocks has divided the other courts that have been asked to decide the issue. Compare *United States v. Huguenin*, 154 F.3d 547, 554-55 (6th Cir.1998); *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992); *Galberth v. United States*, 590 A.2d 990 (D.C.1991), and *Wilson v. Commonwealth*, 29 Va.App. 63, 509 S.E.2d 540 (1999), which held them illegal, with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir.1995), and *State v. Damask*, 936 S.W.2d 565 (Mo.1996), which held them legal. This is our first case. Because it was decided by the district court on a very skimpy stipulation of facts, our ruling on the legality of the City's program is necessarily tentative.

Six times between August and November of last year, the City's police department set up roadblocks on Indianapolis streets to catch drug offenders. A total of 1,161 cars were stopped at these roadblocks--for how long is unclear but the police endeavor to operate the checkpoints in such a manner that the stop does not exceed five minutes. During the stop, the police demand the driver's license and car registration, peer through the car's windows into its interior, and lead a drug-sniffing dog around the car. The stopping of the 1,161

vehicles resulted in 55 drug-related arrests, meaning that 5 percent of the total number of stops resulted in successful drug "hits," and 49 arrests for conduct unrelated to drugs, such as driving with an expired driver's license, for an overall hit rate of 9 percent. The City is continuing the program.

Stopping a car at a roadblock is a seizure within the meaning of the Fourth Amendment, *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), even though the sequel--the peering into the car windows and the sniffing of the car by the dog outside--does not rise to the level of a search as that term of the amendment has been interpreted by the Supreme Court. *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Texas v. Brown*, 460 U.S. 730, 739-40, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *United States v. Ware*, 914 F.2d 997, 1000 (7th Cir.1990); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788-89 (1st Cir.1991). Whether the seizures effected by Indianapolis's drug roadblocks are reasonable may depend on whether reasonableness is to be assessed at the level of the entire program or of the individual stop. If the former, these roadblocks probably are legal, given the high "hit" rate and the only modestly intrusive character of the stops. In many Fourth Amendment contexts, the reasonableness of a practice is held to depend on the balance between its benefits (usually nonpecuniary) and its costs (ditto). E.g., *Wyoming v. Houghton*, --- U.S. ----, ----, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999); *Whren v. United States, supra*, 517 U.S. at 817, 116 S.Ct. 1769; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *Dimeo v. Griffin*, 943 F.2d 679, 681 (7th Cir.1991) (en banc). The benefits of a random system of searches or seizures, such as vehicle stops pursuant to a roadblock system, are a function of, first, the

probability that the stop will result in an arrest or a seizure of contraband or evidence of crime, and, second, the gain to the achievement of a lawful governmental goal that such an arrest or seizure will produce. The costs are a function of the harm that the stop will cause to the property or privacy of the people whose cars are stopped. In the case of Indianapolis's drug-roadblock program, the probability of a "hit" is high (vastly higher than, for example, the probability of a hit as a result of the screening of embarking passengers and their luggage at airports, see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n. 3, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)), and the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances. The cost--in delay, anxiety, and invasion of privacy--to the drivers and passengers stopped for five minutes at a roadblock and subjected to a visual inspection of the interior and a sniff by a dog is small, though it is greater than the cost of the normal airport screening and (like that screening) is incurred in all stops while the benefit from the program is obtained only when there is a hit.

But courts do not usually assess reasonableness at the program level when they are dealing with searches related to general criminal law enforcement, see, e.g., *Whren v. United States, supra*, 517 U.S. at 810, 116 S.Ct. 1769, rather than to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders. E.g., *Michigan v. Tyler*, 436 U.S. 499, 504-06, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Camara v. Municipal Court, supra*; *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574 (7th Cir.1999). Because it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy. In high-crime areas of America's cities it might justify methods of policing that are

associated with totalitarian nations. Cf. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). One can imagine an argument that it would be reasonable in a drug-infested neighborhood to administer drug tests randomly to drivers and pedestrians. Although there is nothing in the text of the Fourth Amendment to prevent dragnet searches (read literally, the text requires only that searches and seizures be "reasonable" and confines the requirement of "probable cause" to searches or seizures made pursuant to warrant), the Supreme Court has insisted that "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing," save in cases of "special need" based on "concerns *other than crime detection*." *Chandler v. Miller*, 520 U.S. 305, 313-14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (emphasis added); see also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560-61, 96 S.Ct. 3074; *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Program-level justifications for searches in support of specific regulatory programs do not carry over to general criminal law enforcement. See, e.g., *Chandler v. Miller*, *supra*, 520 U.S. at 313-14, 117 S.Ct. 1295; *New York v. Burger*, 482 U.S. 691, 716 n. 27, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Michigan v. Tyler*, *supra*, 436 U.S. at 508, 98 S.Ct. 1942; *Donovan v. Dewey*, 452 U.S. 594, 598 n. 6, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *Abel v. United States*, 362 U.S. 217, 226, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion); *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir.1989).

The qualification in "ordinarily" must not be overlooked. When the police establish a roadblock on a route that they know or strongly suspect is being used by a dangerous criminal to escape, the probability is high not only of

apprehending the criminal but also of preventing him from engaging in further criminal, or otherwise hazardous, activity incidental to his escape. See, e.g., *United States v. Harper*, 617 F.2d 35, 40-41 (4th Cir.1980). So the roadblock is allowed even though it is likely to "seize" some individuals who are not suspected of wrongdoing.

But here the roadblock is meant to intercept a completely random sample of drivers; there is neither probable cause nor articulable suspicion to stop *any* given driver. Even so, we can imagine cases in which, although the police do not suspect anyone, a roadblock or other dragnet method of criminal law enforcement would be reasonable. We may assume that if the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis, they would not be violating the Constitution if they blocked all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity. See *Maxwell v. City of New York*, 102 F.3d 664 (2d Cir.1996); *Norwood v. Bain*, 143 F.3d 843, 845-50 (4th Cir.1998), *aff'd.* (so far as pertinent), 166 F.3d 243, 245 (4th Cir.1999) (en banc) (per curiam); *United States v. Williams*, 372 F.Supp. 65 (D.S.D.1974); *Brinegar v. United States*, 338 U.S. 160, 183, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (Jackson, J., dissenting); 4 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (3d ed.1996); American Law Institute, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(2) (1975). When urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact. But no such urgency has been shown here.

The Supreme Court has upheld the validity of roadblocks in less extreme cases, however, and it is on these that the City

pitches its defense of its program. The Court upheld sobriety checkpoints--roadblocks at which drivers are checked for being under the influence of alcohol or (other) mind-altering drugs--in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and roadblocks designed to intercept illegal immigrants, in *United States v. Martinez-Fuerte, supra*. The Court has not, however, ever held or stated that *all* roadblock programs (even those not vulnerable to a charge of delegating too much discretion to individual police officers) are consistent with the Fourth Amendment. On the contrary, the amendment would be violated if "the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Texas v. Brown, supra*, 460 U.S. at 743, 103 S.Ct. 1535 (plurality opinion); *see also United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975).

Randomized search programs have been upheld that involved the compelled provision of urine samples for drug testing of law enforcement officers, jockeys, railroad workers, and other classes of employee, e.g., *Vernonia School District 47J v. Acton, supra*; *National Treasury Employees Union v. Von Raab, supra*, 489 U.S. at 665-66, 109 S.Ct. 1384; *Skinner v. Railway Labor Executives' Ass'n, supra*; *Dimeo v. Griffin, supra*, as well as administrative searches conducted without any basis to suspect any particular individual of wrongdoing, but rather pursuant to a program of inspections incidental to a general scheme of licensing or other regulation. E.g., *New York v. Burger, supra*; *Michigan v. Tyler, supra*; *Camara v. Municipal Court, supra*; *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127 (7th Cir.1988). But again the Court has not granted carte blanche.

Many of the cases we have cited do involve criminal prosecutions, however, and we must consider how they can

be squared with the principle that the requirement of individualized suspicion is to be relaxed only on the basis of (as the Supreme Court said in the *Chandler* case, an example of a systematic search program that did not pass constitutional muster) "concerns *other than* crime detection." The answer is that the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged. Consider employment drug tests for transport workers, as in the *Skinner* case. The employee who uses drugs will perform badly in his work, to the detriment of fellow employees or the general public; and the most effective preventive measure may be to test all or a random selection of applicants or employees. Similar are sobriety checkpoints, which are designed to protect other users of the road from the dangers posed by drunk drivers; administrative searches that are ancillary to concededly lawful systems of inspection; and the use of metal detectors and x-ray machines to screen entrants to government buildings and embarking air travelers. *United States v. Herzbrun*, 723 F.2d 773, 775-76 (11th Cir.1984); *United States v. Edwards*, 498 F.2d 496 (2d Cir.1974) (Friendly, J.); *United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir.1973). These cases rest on the commonsense principle that employers and other proprietors (such as the state as the owner of public roads), including the quasi-proprietor that is the government in heavily regulated industries, *see, e.g., United States v. Biswell*, 406 U.S. 311, 316-17, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), have a right to take reasonable measures to protect the safety and efficiency of their operations. These measures, moreover, usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity, though we hesitate to put much weight on this point; people

are unlikely to feel they can afford to "ground" themselves in order to avoid airport searches.

Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime. Imagine if the government set up a metal detector outside each person's home and required the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit. A principle that justified a drug roadblock would justify such surveillance.

We mentioned cases that allow the police or the Border Patrol to set up roadblocks to intercept illegal immigrants, a form of "contraband" to which illegal drugs might be analogized. Other cases allow custom searches of the luggage of people entering the United States. For examples of both types of case, see *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985); *United States v. Martinez-Fuerte*, *supra*; *United States v. Ramsey*, 431 U.S. 606, 616-19, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *United States v. Johnson*, 991 F.2d 1287, 1290-92 (7th Cir.1993). But such cases depend ultimately on sovereign powers over foreign relations, foreign commerce, citizenship, and immigration (see, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-89, 72 S.Ct. 512, 96 L.Ed. 586 (1952) (Jackson, J.)) that states and cities do not possess. *Martinez-Fuerte* involved searches well inland from the border, but the Court emphasized the infeasibility of preventing illegal immigration by border checks alone. 428 U.S. at 552, 96 S.Ct. 3074.

We are mindful of the paradoxical implication that the Fourth Amendment, though originally limited to federal law enforcement, may pinch the states more tightly. But the

paradox need not detain us. Indianapolis makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons. Though that may be the ultimate aim, the City concedes that its proximate goal is to catch drug offenders in the hope of incapacitating them, and deterring others, by criminal prosecution. The program has no regulatory purpose that might be compared to that of the immigration laws, which seek to exclude and deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws.

It is true that in the course of looking for drugs in vehicles stopped at its drug roadblocks, the Indianapolis police often discover violations of the traffic laws. If the purpose of the roadblock program were to discover such violations, and if a program having such a purpose could be justified under the cases that allow searches and seizures without individualized suspicion of wrongdoing, then the seizure, in the course of such searches, of drugs that were in plain view would be lawful. *Texas v. Brown, supra*; *United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995). But the first "if" has not been shown. It is necessary in this regard to distinguish between two kinds of purpose, that of the program's designers and that of the police officers manning the roadblocks. The test for the lawfulness of a particular search or seizure is an objective one; the motives of the officer carrying out the search or seizure are irrelevant. *Whren v. United States, supra*, 517 U.S. at 811-13, 116 S.Ct. 1769; *United States v. VillamonteMarquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978); cf. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). But the purpose behind the *program* is critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals. *New*

York v. Burger, supra, 482 U.S. at 716 n. 27, 107 S.Ct. 2636. "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes." *Whren v. United States, supra*, 517 U.S. at 811-12, 116 S.Ct. 1769 (emphasis in original); *see also Texas v. Brown, supra*, 460 U.S. at 743, 103 S.Ct. 1535 (plurality opinion). Leading a drug-sniffing dog around a car cannot be justified by reference to a desire to detect traffic violations, and so the use of the dog at the City's roadblocks shows--what is anyway not contested--that the purpose of the roadblocks is to catch drug offenders. We are not asked to decide whether, if the primary purpose were to detect drunken drivers, the dog could be added to the roadblock scenario on the theory that since a sniff is not a search, the incremental invasion of privacy would be negligible, or at least would not violate the Fourth Amendment.

It can be objected that requiring consideration of purpose injects too large an element of uncertainty into the interpretation of the amendment, and that purpose may be difficult to determine when it is corporate in nature. But law like politics is the art of the possible and often requires imperfect compromises. Inquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether. The alternative would be to rule that either all roadblocks are illegal or none are, which would be akin to punishing all killings identically because the "objective" fact is that someone has died.

To summarize, we have identified four exceptions to the principle that a search or seizure is forbidden by the Fourth Amendment unless there is a basis for believing that a particular search or seizure, as distinct from a program of universal or randomized searches or seizures, will yield

evidence or fruits or instrumentalities of crime. The first exception, illustrated by the roadblock set up to catch a fleeing criminal, is where there is a suspect--the police have identified the criminal and have only to find him--but it is infeasible to avoid an indiscriminate search or seizure of other persons, persons not suspected of crime, as well. The second exception, illustrated by the hypothetical dynamite case, is where no specific person is under suspicion but the circumstances make it impossible to prevent a crime without an indiscriminate search. The third exception is the regulatory search, the objective of which is to protect a specific activity rather than to operate as an adjunct to general criminal law enforcement. The last exception is the prevention of illegal importation whether of persons (a power limited to the federal government, *Saenz v. Roe*, --- U.S. ----, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999)) or of goods. On the basis of the record compiled in the preliminary-injunction proceedings--a record essentially limited to the parties' stipulation of facts--the Indianapolis roadblock program has not been shown to fit any of these exceptions, and thus the lawfulness of the program has not, as the district judge believed, been established. As that was the only ground on which she denied the preliminary injunction, her order cannot stand.

Whether there may be other grounds for denying the preliminary injunction, or whether on a fuller record the Indianapolis program might pass Fourth Amendment muster, are issues for the district court to decide in the first instance. We are not enthusiastic about the use of the Constitution to squelch experiments in dealing with serious social problems. The high hit rate of Indianapolis's roadblock scheme suggests that Indianapolis has placed the roadblocks in areas of the city in which drug use approaches epidemic proportions; and if so the roadblocks might be justified by reference to the second exception, as illustrated by such cases as *Maxwell* (involving a flurry of drive-by shootings), *Norwood* (threat of

violence at a rally of motorcycle gangs), and *Williams* (Indian insurrection). But this is not argued either. REVERSED.

EASTERBROOK, Circuit Judge, dissenting.

Roadblocks in Indianapolis check for both driving and drug offenses. Someone driving a car without a license, or with drugs, can expect arrest. The program is spectacularly successful as roadblocks go; 9.4% of those stopped are arrested, with the reason equally divided between driving and drug crimes. Roadblocks with much lower rates of success have been held consistent with the fourth amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (0.12% success rate); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (1.6% success rate). Yet my colleagues declare that the fourth amendment forbids what Indianapolis has done, because its primary purpose is to enforce the criminal laws. *Martinez-Fuerte* approved a roadblock to search for alien smuggling, a violation of a criminal law; *Sitz* approved a roadblock to search for drunk driving, a violation of a criminal law. So how can the fact that possessing drugs violates the criminal laws doom this program? One would suppose that our case is a *fortiori* from *Sitz*, because alcohol, marijuana, and cocaine all are drugs, any of which can impair a driver's performance. If the Constitution allows a roadblock to intercept alcohol users, how can it condemn a roadblock to intercept marijuana and cocaine users?

My colleagues' answer is that everything depends on the "primary" or "real" motive for the roadblock. Thus if Indianapolis set out to find people driving without licenses and only later added a dog to sniff for drugs (a step that does not entail a search or seizure of any kind, see *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983))

in cars that already were stopped, then the program would pass constitutional muster. But if the City first decides to search for drugs, then adds license checks to make better use of the time while the dog does its work, then the program is invalid. If a city starts a license + drug program, then its validity depends on the primary motivation: if to search for people not legally entitled to drive, the program is valid; if to search for people not legally entitled to carry drugs, invalid. If a program is designed primarily to search for people *using* drugs in the car, and only secondarily to locate drugs in the trunk, then it is valid; if it is designed primarily to search for carried drugs, and only secondarily for ingested drugs, then it is invalid.

Why should the constitutionality of a roadblock program turn on what its promoters think (or the order in which its components were approved), rather than on what happens to the citizenry? Over and over, the Supreme Court says that the reasonableness inquiry under the fourth amendment is objective; it depends on what the police do, not on what they want or think. *Whren v. United States*, 517 U.S. 806, 811-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985); *Scott v. United States*, 436 U.S. 128, 136-38, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The majority believes that things are otherwise when a program's design is in issue: "the purpose behind the *program* is critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." 183 F.3d at 665 (emphasis in original). Where does "purpose" come into the fourth amendment? Not from its text; reasonableness fairly screams an objective inquiry. Not from its history; my colleagues do not mention the amendment's genesis. Not from the Supreme Court's cases. None of the opinions my colleagues cites requires a tour through the heads of the

programs' sponsors. None suggests that the Constitution blesses a program in which a criminal-investigation component is added to a regulatory-enforcement one, while condemning an identical program in which the criminal-investigation component comes first. When the Supreme Court speaks of "regulatory" programs, such as the searches of business premises in *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), or *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), it asks what the programs *do*, not what the sponsors of the programs *had in mind*. So far as the fourth amendment is concerned, there is no difference between a roadblock originally designed to catch drug peddlers and also used to catch drunk drivers, and a roadblock originally designed to catch drunk drivers and also used to catch drug peddlers. Only observable differences in police behavior enter into the calculus of "reasonableness."

To be consistent, therefore, my colleagues should say that the fourth amendment would not permit the Michigan Department of State Police to add a drug-detection dog to the roadblock program sustained in *Sitz*. That conclusion would be so jarring, given received doctrine that a dog's sense of smell is not a search and requires no justification, that it could not be sustained. Yet if a dog may be added to the program sustained in *Sitz*, it can't matter to "reasonableness" whether some of the program's sponsors thought the dog more important than the breathalyzer. The trial envisaged by my colleagues--one at which officials of Indianapolis will testify about their motivations in approving the roadblock program, and the district judge must make credibility findings to resolve the fourth amendment objection--has no relation to the objective standard that a "reasonableness" benchmark demands.

What has led the majority to its search for the "primary purpose" behind a program, and thus to the startling

conclusion that a given program may be constitutional or not today depending on what the Mayor thought last year, is its belief that "[p]rogram-level justifications for searches . . . do not carry over to general criminal law enforcement." 183 F.3d at 662. Indianapolis has adopted a program that is objectively reasonable given its minimal intrusion and substantial success (183 F.3d at 661), but my colleagues say that only "regulatory" programs may be justified in this manner. Without a distinction between criminal and regulatory searches, it would be impossible to understand *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), which holds that a warrant may be issued without probable cause, despite the text of the fourth amendment, provided the government really isn't looking for anything in particular. But none of the Supreme Court's cases equates "regulatory search" with "regulatory *purpose*"; the Court's line is objective, while my colleagues' is subjective.

For every statement suggesting that criminal law enforcement may not be justified at the program level, it is easy to find another to the contrary-- often in the same opinion. For example, my colleagues quote a few words from *Chandler v. Miller*, 520 U.S. 305, 313-14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). That very opinion contains this passage (*id.* at 308, 117 S.Ct. 1295): "Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in 'certain limited circumstances.' *See Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-550, 566-567, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), or at a sobriety checkpoint, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and administrative inspections in 'closely regulated' businesses,

New York v. Burger, 482 U.S. 691, 703-704, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987)." This treats the roadblock and regulatory cases as independent, undermining the proposition that roadblocks are improper when they seek evidence of crime. Consider what *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), had to say: "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." (Emphasis added.) Lots of avowedly criminal searches are justified at a program level. After making a custodial arrest, the police may conduct a complete search of the person, including the contents of any packages he may be carrying. *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). After entering a dwelling to make an arrest, police may conduct a visual "protective sweep" of other rooms to ensure that armed occupants there do not pose a risk. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The list of searches and seizures justified in the aggregate, without regard to person-specific cause, is quite long. Roadblocks are just another example. See Wayne R. LaFave, 4 SEARCH AND SEIZURE §§ 9.4(j), 9.6(b) (3d ed.1996).

Interpretation of the fourth amendment is not a model of intellectual consistency. See Akhil Reed Amar, FOURTH AMENDMENT FIRST PRINCIPLES, 107 Harv. L.Rev. 757, 757-61 (1994). Cases create oodles of cubbyholes. My colleagues want to take as a fundamental doctrine that criminal investigations require person-specific cause, and conform all fourth amendment law to it. I suppose one could go in a different direction and treat auto searches or housing inspections as the paradigm. But our job as an inferior court is not to pick favorite passages from the hundreds of fourth amendment opinions the Supreme Court has issued, but to

apply the principles devised for the most closely analogous cases. This is a roadblock case. To figure out how to handle a roadblock case, we must look at how the Supreme Court has handled other roadblock cases.

Neither *Sitz* nor *Martinez-Fuerte* involved a regulatory inspection, yet in each the Court assessed reasonableness at the program level. Michigan searched for drunk driving and the United States for alien smuggling. Because both programs were designed to enforce the criminal laws, a simple criminal- regulatory distinction won't fly. This impels my colleagues to proclaim a multivariate approach under which the reasonableness of criminal investigations will be assessed at the program level if some other condition holds--if there is a *really* pressing need (the search for a terrorist), if the reason for the stop is closely related to the dangers of driving (the search for drunk drivers), if the stop is justified by some "special" governmental power. So much for the organizing principle with which the majority begins. Why use a principle that disintegrates at first application?

Neither *Sitz* nor *Martinez-Fuerte* uses the approach my colleagues devise. Let's work through the line of reasoning that actually appears in these opinions.

First, the privacy interest of drivers is diminished relative to the interests of people at home or in the office. E.g., *Wyoming v. Houghton*, --- U.S. ----, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). *Carroll* is close to the mark, because there the Court sustained the search of a vehicle for closed bottles of alcohol, which during Prohibition was treated the same way marijuana and cocaine are treated today. Recognition that drivers have a diminished expectation of privacy is missing from my colleagues' opinion. Instead they analogize a roadblock to a program under which "the government set up a metal detector outside

each person's home and required the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit. A principle that justified a drug roadblock would justify such surveillance." 183 F.3d at 664. No, it wouldn't; the special treatment of automobiles provides a stopping point. One may question this treatment as an original matter, but it is entrenched in the Supreme Court's jurisprudence and is the key to analyzing roadblocks.

Second, the invasion of privacy at a roadblock is slight. Detention is short, the search superficial. Indeed, the use of a dog is not a "search" at all. A roadblock administered the way Indianapolis handles its program is less intrusive than the search of one's person and belongings at an airport, another familiar kind of "roadblock" (and one that, like the Indianapolis program, is designed to find evidence of crime, such as carrying weapons aboard an aircraft). Cases since *Sitz* and *Martinez-Fuerte* describe roadblocks in these terms--as reasonable in light of the minimal intrusion, not because they are "regulatory" or conducted with an approved "motive." See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 587-88, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), and the passages from Chandler and Brown quoted above.

Third, a small invasion can be justified by aggregate success. "Probable cause," the level of suspicion adequate to support a custodial arrest that may last for days, is something less than a 50% likelihood; "reasonable suspicion," enough to support a frisk, means substantially less than "probable cause," *see United States v. Chaidez*, 919 F.2d 1193 (7th Cir.1990); and as a brief stop is less intrusive than a frisk, an even lower probability of detecting crime suffices. *Martinez-Fuerte* holds a probability under 1% will do for a roadblock, and in Indianapolis the probability is much greater. (The probability of finding a bomb in an airport search must be less than one in ten million, given the volume of air traffic,

but judges think this sufficient given the gravity of the evil being detected. Can my colleagues believe that drugs are so harmless that a 5% detection rate makes a search unreasonable even when the intrusion is slight?)

Fourth, the principal risk in allowing stops of vehicles without person-specific cause is that the officers will abuse the discretion thus conveyed. Some officers will stop people for the "offense" of DWB ("driving while black"); other officers, though pure of heart, may make stops at times or in places that leave the drivers apprehensive about their safety. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), holds that the fourth amendment does not tolerate standardless discretion in making stops, and the Court suggested that Delaware use instead the roadblock or checkpoint approved in *Martinez-Fuerte*. Cf. *Chicago v. Morales*, --- U.S. ----, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Indianapolis was at pains to establish a rigorous protocol for its stops. Roadblocks are fixed; the number of cars selected for inspection is fixed; the procedure following a stop is fixed. So the concern that led to *Prouse* is missing, and the first three considerations show that the roadblock is reasonable.

Because *Martinez-Fuerte* so clearly involves criminal law enforcement, the majority creates still another special rule: "such cases depend ultimately on sovereign power over foreign relations, foreign commerce, citizenship, and immigration". 183 F.3d at 664. Any implication that the Court in *Martinez-Fuerte* relied on such a special power would be incorrect. The checkpoints were between 65 and 90 miles inland. The Court's point was not that Congress has extra powers to conduct domestic searches for aliens, but that "traffic-checking practices . . . appropriately are subject to less stringent constitutional safeguards." 428 U.S. at 555, 96 S.Ct. 3074. Although *Martinez-Fuerte* involved immigration, never did the Court say that enforcement of this body of laws

should be especially easy. *See particularly* 428 U.S. at 561-62, 96 S.Ct. 3074:

> [Here] we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, e.g., *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. *United States v. Ortiz*, 422 U.S., at 896 n. 2, 95 S.Ct. 2585; *see Cardwell v. Lewis*, 417 U.S. 583, 590-591, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion). And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

Everything the Court wrote about the checkpoints in *Martinez-Fuerte* can be said about the roadblocks in Indianapolis.

Treating *Martinez-Fuerte* as exemplifying a "border exception" or "immigration exception" to normal fourth amendment principles turns that amendment on its head. The

fourth amendment reflects antipathy toward efforts to enforce the customs laws by searching warehouses for dutiable goods. See Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 234-46 (1988); Telford Taylor, SEARCH, SEIZURE AND SURVEILLANCE, IN TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-44 (1969). Inland searches based on the national government's power over immigration and importation (*Martinez-Fuerte* was *not* a border search) should be evaluated under the fourth amendment's normal "reasonableness" standard; instead my colleagues treat the immigration power as a reason to reduce the force of the fourth amendment. As a side effect, the national government, the object of the fourth amendment, winds up with greater freedom to conduct searches and seizures than state and local governments, which have been brought within the fourth amendment only indirectly. Any approach that carries this "paradoxical implication" (183 F.3d at 664) must be rejected. Giving the national government more leeway than the states to conduct searches, and treating immigration and customs searches as especially easy to justify, are so at war with the text and history of the Constitution that they cannot be sustained.

Searches by the national government pose a serious threat to the citizenry; searches by local governments pose less, because movement within the country is easy. Some cities enforce their drug laws by heavy reliance on spies, infiltrators, informers, turncoats, wiretaps, and nighttime searches where battering rams smash through doors; others may substitute more civil methods, such as roadblocks where the only imposition is a five-minute wait with man's best friend outside. Which of these is most like the "methods of policing that are associated with totalitarian nations" (183 F.3d at 662)? Police and prosecutors today ply people with favors so that friends and family become informers; lying about their identity, agents wheedle their way into strangers' confidences; they search trash in the hope of finding an

incriminating scrap. Scaling back these tactics (none of which requires person-specific justification) in favor of roadblocks would make enforcement of the drug laws a good deal more reasonable. Or so at least the people may conclude.

One glory of a federal society is that the people may choose for themselves not only laws but also law-enforcement methods. State A may employ extra police to follow a high-probability-of-detection and low-sentence approach; State B may choose fewer police, fewer intrusions on privacy, but higher sentences for those who are caught. Each may be reasonable. Indianapolis selected a roadblock system, one that may catch any of its drivers. If this strikes the wrong balance, the people may throw out of office those who adopted it. Given the modest intrusion that roadblocks create for personal privacy, this is a legitimate choice for the public to make. The real threat to civil liberties comes from the national government, not from law-enforcement variations that can be avoided by driving a few miles to the east or west. Local governments should have more, not less, leeway than does the national government to decide how the tradeoff between privacy and effective law enforcement shall be handled.

James EDMOND, Joell Palmer, on their own behalf and on behalf of a class of those similarly situated, Plaintiffs,

v.

Stephen GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; Indianapolis, Indiana; and Unknown Members of the Indianapolis Police Department, Defendants.

No. IP 98-1400-C-B/S.
United States District Court,
S.D. Indiana,
Indianapolis Division.
Nov. 18, 1998.

Motorists brought action against city, mayor, and police department, challenging constitutionality of drug interdiction checkpoints. On motorists' motions for class certification and preliminary injunction, the District Court, Barker, Chief Judge, held that: (1) class certification was warranted, and (2) checkpoints did not violate Fourth Amendment.

Plaintiffs' motions granted in part, and denied in part.

Kenneth J. Falk, Indiana Civil Liberties Union, Indianapolis, IN, for plaintiffs.

Thomas Satron, Chief Litigation Counsel, Office of Corporate Counsel, City of Indianapolis, Indianapolis, IN, for defendant.

ENTRY GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BARKER, Chief Judge.

This matter comes before the Court on Plaintiffs' Motion for Preliminary Injunction in which Plaintiffs seek to enjoin Defendants from conducting drug interdiction checkpoints, and Plaintiffs' Motion for Class Certification.

While we *GRANT* Plaintiffs' Motion for Class Certification, we must *DENY* Plaintiffs' Motion for Preliminary Injunction because the City of Indianapolis' use of drug interdiction checkpoints does not violate the Fourth Amendment to the United States Constitution.

I. BACKGROUND[1]

Since August of 1998, the Indianapolis Police Department (IPD), in cooperation with other law enforcement agencies, has conducted at least six drug interdiction checkpoints at various locations in Indianapolis. The primary goal of the checkpoints is to interrupt the flow of illegal narcotics throughout Indianapolis.

The parties have agreed that for purposes of Plaintiffs' request for preliminary injunctive relief, it will be assumed that the checkpoints are being, and would continue to be,

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[1] The parties stipulate to the material facts. Hence, an evidentiary hearing on the preliminary injunction motion was unnecessary. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997) (hearing on preliminary injunction unnecessary if no genuine issues of material fact); *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 682 (7th Cir.1983) (same).

conducted in accordance with the IPD's written guidelines.[2] Those guidelines are as follows:

DRUG CHECKPOINT CONTACT OFFICER
DIRECTIVES BY ORDER OF THE CHIEF OF POLICE

1. Upon approaching vehicle, ask driver for license and registration. Advise the citizen that they are being stopped briefly at a drug checkpoint.

2. Look for signs of impairment, conduct open view examination of vehicle from outside vehicle.

3. If you have articulatable reasons to reasonably believe the person might be armed, you should ask the person to exit the vehicle where a pat-down in conformance to the rule of *Terry v. Ohio* should be performed in an attempt to locate a *weapon*.

4. If you have an articulatable reason to reasonably believe the person might be armed, you may also search the passenger compartment of the vehicle *for a weapon*.

5. A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. A court will look at the totality of the circumstances to determine if the consent was given willingly and knowingly. If the person is in custody (beyond being stopped at the checkpoint), then Indiana law requires the

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[2] The parties stipulate to these material facts only for purposes of the preliminary injunction motion. (*See* Stipulation of the Parties.)

person be warned of their right to counsel before giving consent to the police to search.

6. A warrantless search of a vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence or fruits of crimes. Probable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable cause.

7. A vehicle in police custody which is to be towed may be inventoried pursuant to General Order 9.02. The towing of a vehicle must be "reasonable" before a court will permit an inventory to be conducted.

8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE *SAME* MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.

9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE (sic) BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, *THE VERY NEXT* SEQUENCE OF VEHICLES WILL BE STOPPED. *NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.*

(Stipulation of the Parties, Attachment 1.)

Approximately thirty (30) Indianapolis Police Department officers are present at each checkpoint, along with patrol cars containing mobile date terminals. Stipulation of the Parties at ¶ 7.) Not every vehicle encountering the checkpoint area is stopped. Rather, prior to the operation of the checkpoint, IPD supervisors determine how many vehicles will be stopped at a time. (Marshall Depew Affidavit at ¶ 3.) The checkpoints are begun by stopping the predetermined number of vehicles. (Id. at ¶ 4.) The rest of the traffic is allowed to proceed with no interruption until the stopped vehicles have all been initially processed and either allowed to proceed or diverted for further processing. (*Id.*) When the last of the initially stopped vehicles has left, then the next group (of the same predetermined number) of vehicles is stopped for processing. (*Id.*) These stops continue in this manner, with no discretion in the number of vehicles stopped or which vehicles are stopped. (*Id.*) "When drivers are stopped, the officers ask for [their driver's] license and [vehicle] registration. If the driver does not possess a valid license and registration, then the information is run through the mobile data terminal in the adjacent police car." (Stipulation of the Parties at ¶ 7.) A typical stop lasts 2 to 3 minutes. (Depew Aff. at ¶ 5.)

II. CLASS CERTIFICATION

Plaintiffs move for class certification for purposes of injunctive and declaratory relief.[3] Federal Rule of Civil

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[3] A hearing is not required prior to granting or denying a motion for class certification. *See Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 459 (11th Cir.1996); *Hartman v. Duffey*, 19 F.3d 1459, 1473 (C.A.D.C.1994).

Procedure 23(c)(1) directs district courts to rule on the issue of class certification "as soon as practicable." *See Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir.1992). Therefore, a court must resolve such issues before it addresses dispositive motions. *See DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 463 (7th Cir.1990); *Bieneman v. City of Chicago*, 838 F.2d 962 (7th Cir.1988); *Hickey v. Duffy*, 827 F.2d 234 (7th Cir.1987). Although Plaintiffs' motion for a preliminary injunction is not dispositive, we feel compelled nevertheless to address the class certification question before resolving the issue of preliminary injunctive relief.[4]

The parties stipulate to a certification of the Plaintiffs' class, as follows:

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[4] Plaintiffs bring their Complaint as a class action for declaratory and injunctive relief and as an individual action for damages. One may well question the need to bring any part of the Complaint as a class action, as a ruling on the constitutionality of the checkpoints will inevitably apply to all motorists in Indianapolis. But in the Seventh Circuit, "it is clear that, if the prerequisites and conditions of Rule 23 have been met, a court may not deny class status because there is no 'need' for it." *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir.1976); *Bieneman v. City of Chicago*, 838 F.2d 962, 964 (7th Cir.1988); see also 7B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1785.2 (1986 & Supp.1998). Even if certification is unnecessary for practical reasons, certification may not be denied if Rule 23 is satisfied. *See Paul v. State of Indiana Election Board*, 743 F.Supp. 616, 618 (S.D.Ind.1990) (Barker, J.).

> any and all persons driving vehicles who have been stopped or [are] subject to being stopped in the future at the drug interdiction roadblocks maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use.

(Stipulation to Certify Cause as a Class Action.)

Although the parties stipulate to the certification, the court has a duty to evaluate independently the proposed class to ensure its compliance with Fed.R.Civ.P. 23. *See Retired Chicago Police Assn. v. City of Chicago*, 7 F.3d 584, 599 (7th Cir.1993). Rule 23(a) sets forth the general prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In this case, Plaintiffs clearly meet these threshold requirements. First, the class probably exceeds one half million members and continues to grow each day, rendering joinder of all members of the class impracticable. Second, the legal issues surrounding the roadblocks are largely the same, with the principal dispute being their constitutionality. Third, the claims of the representative parties are typical of the claims of the class. Finally, the party representatives appear committed to this cause and their counsel is a very

capable and skilled attorney, with extensive experience in similar matters.

Rule 23(b) contains additional requirements for class actions. First, separate actions must create a risk of inconsistent adjudications or adjudications that would be dispositive of the interest of other members not parties. *See* Fed.R.Civ.P. 23(b)(1). Second, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *See* Fed.R.Civ.P. 23(b)(2).[5]

Both of these requirements are also easily satisfied here. Separate adjudications on this issue would certainly create the risk of inconsistent rulings, in addition to potentially disposing of the issue of the checkpoints' constitutionality without the involvement of all class members. Further, Defendants' actions impact all the proposed class members as a group, thereby making injunctive relief appropriate. Accordingly, we find that Plaintiffs satisfy all the conditions

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[5] Fed.R.Civ.P. 23(b)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. These requirements, however, apply only to classes that seek damages. They do not apply to a class, like the one proposed here, that seeks only injunctive and declaratory relief. *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1267 (7th Cir.1983).

for a Rule 23(b)(2) class action, and we thus *CERTIFY* Plaintiffs' class.

III. PRELIMINARY INJUNCTION

We now turn to the heart of this dispute--Plaintiffs' Motion for Preliminary Injunction. When evaluating a motion for preliminary injunctive relief, we must determine whether the party seeking relief has demonstrated that: (1) there is a reasonable likelihood of success on the merits of its claim; (2) no adequate remedy at law exists; (3) irreparable harm will result if preliminary injunctive relief is denied; (4) the irreparable harm suffered without preliminary injunctive relief outweighs the irreparable harm the nonmoving party will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest. *Platinum Home Mortgage Corp. v. Platinum Financial Group, Inc.*, 149 F.3d 722, 726 (7th Cir.1998); *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir.1997). "The threshold consideration in a motion for a preliminary injunction is the moving party's likelihood of success on the merits of the underlying claim." *Id.*

Plaintiffs contend that Defendants have violated the Fourth Amendment by using roadblocks to seize motorists without individualized suspicion for the primary purpose of determining if they possess or are under the influence of illegal drugs.[6]

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[6] The Fourth Amendment was incorporated against the states by the Fourteenth Amendment's Due Process

[Footnote continued on next page]

There is no question that stopping a vehicle at a traffic checkpoint by law enforcement officers constitutes a seizure within the meaning of the Fourth Amendment. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990); *United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995). To be reasonable under the Fourth Amendment, a seizure ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). However, the Supreme Court has held that individualized suspicion is unnecessary when the seizure is a brief stop for questioning or observation at a sobriety or immigration roadblock. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (sobriety); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (immigration). The Court has also strongly implied that such roadblocks for driver's license and vehicle registration checks are permissible. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (approving in dicta); *see also United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995) (upheld checkpoint for license and insurance checks).

The Supreme Court has held that a Constitutional challenge to a law enforcement checkpoint turns on whether the initial stop at the checkpoint was reasonable. *Id.; see also Trevino*, 60 F.3d at 336. This, in turn, requires a balancing of the intrusion on the individual's Fourth Amendment rights occasioned by the initial stop against the promotion of legitimate governmental interests (hereinafter

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[Footnote continued from previous page]

Clause. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7th Cir.1997).

referred to as the *Brown* balancing test). *Sitz*, 496 U.S. at 449-50, 110 S.Ct. at 2484-85; *Brown v. Texas*, 443 U.S. 47, 49, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). In applying the *Brown* balancing test, the Supreme Court has stated that district courts must consider the circumstances of both the "objective intrusion" of the seizure--the duration of the stop itself and the intensity of any questioning and visual inspection that might attend it, *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486,--and the "subjective intrusion"--its potential for generating fear and surprise to law-abiding motorists. *Id.; see also Trevino*, 60 F.3d at 336.

A) *BROWN BALANCING TEST DETERMINES THE CONSTITUTIONALITY OF DEFENDANTS' CHECKPOINTS*

Plaintiffs contend that the *Brown* balancing test does not apply in this case and, thus, cannot justify the checkpoints. According to Plaintiffs, the *Brown* balancing test is appropriate only if the government can demonstrate a "special need" for the checkpoints beyond the normal need for criminal law enforcement. (Plaintiffs' Memorandum in Support at 7-9) (*citing Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). Plaintiffs contend that the public interest cited here--drug interdiction--is not a "special need" that checkpoints may be used to target.

Unfortunately for Plaintiffs, the Supreme Court in *Sitz*, 496 U.S. at 451, 110 S.Ct. 2481, has previously rejected this analysis, holding that the "special needs" requirement set

forth in *Von Raab* and *Skinner*[7] does not apply to "cases dealing with police stops of motorists on public highways." *Id.* at 496 U.S., at 450, 110 S.Ct., at 2485. Instead, the Court directed that the reasonableness of a seizure of a motorist on a public highway without individualized suspicion be determined solely on the basis of the *Brown* balancing test. *Id.* Therefore, consistent with *Sitz*, we evaluate the constitutionality of the checkpoints before us by applying the *Brown* balancing test.

B) *APPLYING THE BROWN BALANCING TEST*

1) *GOVERNMENT'S INTEREST*

The government's interest in interdicting narcotics is beyond serious dispute. The narcotics industry is "one of the greatest problems affecting the health and welfare of our population," *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 1392, 103 L.Ed.2d 685 (1989), and has created a "veritable national crisis in law enforcement." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S.Ct. 3304, 3309, 87 L.Ed.2d 381 (1985). We need not dwell further on this issue.

The more significant issue is whether the checkpoints in controversy here are effective in addressing the drug problem. We do not attempt to determine, however, whether the use of checkpoints is the most effective means of achieving the government's objectives, or even whether it is more or less effective than other means. It is not for the

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[7] Both Skinner and Van Raab address mandatory drug testing, not checkpoints.

courts to decide "which among reasonable alternative law enforcement techniques should be employed .... [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54, 110 S.Ct. at 2487. The courts must decide only whether, when evaluated against the importance of the governmental interest and the degree of intrusion, the checkpoints are at least reasonably effective as a tool for advancing the government's interest. *Id.*

The uncontroverted evidence establishes that the checkpoints in this case have resulted in fifty-five drug related arrests out of a total of 1161 vehicles stopped, representing an effectiveness ratio (number of arrests divided by number of vehicles stopped) of approximately 4.7%. (*See* Defendants' Exhibit B.) Although at first blush this figure may appear low, the Supreme Court has approved checkpoints where the effectiveness ratio was 1.6% (*Sitz, supra*--sobriety checkpoint) and 0.5% (*United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)--immigration checkpoint). Relative to these other cases, the checkpoints in the instant case are substantially more effective.

2) *LEVEL OF INTRUSION*

Next we address the extent of the intrusion imposed upon the individual motorists subjected to the checkpoints. In making this examination, we consider both the objective and subjective intrusions that the motorists have necessarily encountered. *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486.

a) *Subjective Intrusion*

"[T]he critical factors in assessing a checkpoint's 'subjective intrusion' are, first, whether it is set up in a manner which informs incoming motorists that this is an official stop and, secondly, whether it gives the officers conducting the stop unbridled discretion to randomly target individual motorists." *Trevino*, 60 F.3d at 337; *see also Sitz, supra.*

We are told that the individual motorists are informed that the checkpoints are official by virtue of the obvious massive law enforcement presence at each checkpoint, including a large number of uniformed officers with fully marked police vehicles. Additionally, the dates of the checkpoint operations (not their locations) have been released in advance to the public, resulting in media coverage which has increased public awareness of their existence.

Second, and perhaps more importantly with regard to analyzing the degree of subjective intrusion, is the amount of discretion afforded law enforcement officers at the scene. The constitutionality of a checkpoint often turns on officer discretion. *See Sitz, supra; Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116; *United States v. Huguenin*, 154 F.3d 547, 557 (6th Cir.1998).

The IPD guidelines restrict the discretion of officers on the scene, but do not eliminate it altogether. For example, the City acknowledges that "[i]n the event a problem occurs which requires a change in the pattern of stopping vehicles, an on scene supervisor will determine what stopping sequence is appropriate and document the change with an appropriate explanation for the change." (Government's Response Brief at 14.) The on-scene supervisor is provided discretion apparently in order to ensure that traffic backups do not create an unconstitutional seizure by virtue of the

length of the traffic delay--a valid concern. Although officers at a checkpoint should be vested with the least amount of discretion reasonable under the circumstances, we recognize that some limited discretion is necessary to properly address concerns such as traffic backups or ensnarlments that may inherently accompany the checkpoint process. Here, a supervisor's authority is limited to changing the stopping sequence only when traffic problems occur, not simply on a whim or on some other basis. This is an allowance of minimal discretion and has been afforded only to the on-scene supervisor. It is sufficiently circumscribed to pass constitutional muster. In all other respects, the policy directs that the on-scene officers operate without discretion. Their actions are strictly regulated by the official checkpoint guidelines that have been promulgated by the Chief of Police. Accordingly, we hold that the level of subjective intrusion experienced by motorists stopped at the police checkpoints is minimal.

b) *Objective Intrusion*

The level of objective intrusion is determined by the duration of the stop itself and the intensity of any questioning and visual inspection that might attend it. *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486.

The typical stop at the Indianapolis checkpoints lasts approximately 2 to 3 minutes. (*See* Depew Aff. ¶ 5.)[8] As previously discussed, the checkpoints are conducted so as to

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[8] Of course, further detention of a particular motorist occurs when officers develops individualized suspicion of wrongdoing.

avoid traffic delays, which could cause a motorist to be detained, that is, "seized" for a duration exceeding constitutional limits.[9] *See Merrett v. Moore*, 58 F.3d 1547, 1552 (11th Cir.1995), *cert. denied*, 519 U.S. 812, 117 S.Ct. 58, 136 L.Ed.2d 21 (1996). As it is, the duration of the stops is consistent with checkpoints approved by the Supreme Court in both Sitz and Martinez-Fuerte. In those cases, the Court upheld the constitutionality of brief roadblock seizures that lasted about twenty-five seconds at a sobriety checkpoint, (*Sitz*, 496, U.S. at 444-56, 110 S.Ct. at 2483-88), and seizures that lasted 3 to 5 minutes at an immigration checkpoint away from the border. *Martinez-Fuerte*, 428 U.S. at 544-48, 96 S.Ct. at 3077-78.

The questioning and inspection occurring during the checkpoint stops in this case include asking for the motorist's driver's license and vehicle registration and having a narcotics dog sniff the exterior of their vehicle. Though asking for a motorist's license and registration is fairly non

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[9] Whether one is "seized" while waiting in traffic to reach the checkpoint and, thus, whether that delay should be considered in assessing the reasonableness of the operation, depends on whether the person reasonably believed he or she was not free to turn around and avoid the checkpoint. *Merrett v. Moore*, 58 F.3d 1547, 1552 (11th Cir.1995), *cert. denied*, 519 U.S. 812, 117 S.Ct. 58, 136 L.Ed.2d 21 (1996). "The clock for assessing the reasonableness of the delay caused by the checkpoint begins to run when a reasonable person would believe he cannot leave the line and avoid the checkpoint." *Id.* (*citing United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

intrusive, having a dog sniff the exterior of a motorist's vehicle warrants a closer look. Here, the drug detection dog sniffs only the exterior of the vehicle and is positioned in a place the dog has the right to be, suggesting that the intrusion is similar to that of an officer looking for contraband in plain view. *Cf. Horton v. California*, 496 U.S. 128, 142, 110 S.Ct. 2301, 2311, 110 L.Ed.2d 112 (1990). Indeed, the Seventh Circuit has held that "[a] sniff test, by a well-trained narcotics detection dog, involves only minimal intrusion into a person's privacy." *United States v. Teslim*, 869 F.2d 316, 323 (7th Cir.1989) (*citing United States v. Place*, 462 U.S. 696, 706-707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983)). Other courts have determined specifically that a narcotics dog's sniff of the exterior of a vehicle does not, in itself, constitute a "search." *See United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir.1991); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990). The drug detection sniff and the license and registration check together and separately constitute a minimal and thus an acceptable degree of intrusion.

3) *CONCLUSION: CHECKPOINTS CONSTITUTIONAL UNDER BROWN BALANCING TEST*

Overall, the checkpoints in controversy are targeted effectively and are limited sufficiently to combat the city's drug crisis with minimal intrusion on motorists. Accordingly, we hold that the checkpoint procedures are constitutional under the *Brown* balancing test.

An examination of the two leading Supreme Court cases on highway roadblocks--*Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)--reveals strong support for our holding. In *Sitz*, the Court approved the use of sobriety checkpoints where the motivation was the

government's "interest in preventing drunk driving." 496 U.S. at 455, 110 S.Ct. 2481. There, the Court simply applied the *Brown* balancing test and determined that the magnitude of the drunk driving problem, coupled with the effectiveness of the checkpoints, outweighed the minimal intrusion on motorists. Other than the shear magnitude of the drunk driving crisis, the Court did not identify any other special or regulatory need to justify the use of checkpoints to combat drunk driving. *Id.*

Similar to the government's strong interest in preventing drunk driving, the narcotics checkpoints in this case are justified by the government's similarly strong interest in preventing drug trafficking. The intrusion on the rights of motorists in this case is no greater than the level of intrusion approved in *Sitz*. If *Sitz* were the only Supreme Court discussion of roadblocks, one might attempt to distinguish sobriety checkpoints from narcotics checkpoints on the basis that sobriety checkpoints relate directly to highway safety. Prior to *Sitz*, however, the Supreme Court in *Martinez-Fuerte* upheld a checkpoint away from the international border to search for illegal aliens, which need obviously had no direct relation to highway safety.

Applying the *Brown* balancing test, the Court in *Martinez-Fuerte* held that routine checkpoint stops were necessary because the flow of illegal aliens cannot be controlled effectively at the border. *Id.* at 556-557, 96 S.Ct. at 3082-3083. The Court concluded that the checkpoint stop to search for illegal aliens was a "quite limited intrusion" on Fourth Amendment interests. *Id.* at 557-558, 96 S.Ct. at 3082-3083.

Like illegal aliens in *Martinez-Fuerte,* the flow of narcotics cannot be effectively stopped at the border or through other conventional law enforcement methods, as expressed by the police department in the case at bar and as

evidenced by the continuing drug problem. Indeed, narcotics are easily hidden in an automobile, in that sense posing even greater detection problems than do illegal aliens. Absent the holding in *Sitz*, it might be argued that immigration checkpoints are distinguishable from narcotics checkpoints because immigration checkpoints advance an administrative purpose, not a criminal one. *Sitz*, however, explicitly disposes of that contention, holding that it is permissible for a checkpoint to implicate possible criminal sanctions, *i.e.* arresting drivers for drunk driving.[10] Together, *Sitz* and *Martinez-Fuerte* make it clear that an otherwise valid checkpoint is not unconstitutional simply because its primary purpose is to interdict narcotics traffic.[11]

Although neither the Supreme Court nor the Seventh Circuit has addressed specifically whether a checkpoint for

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[10] Moreover, as we have noted previously, *Sitz* does not require a "special need."

[11] Checkpoints have been upheld routinely for other purposes as well. *See, e.g., United States v. Trevino*, 60 F.3d 333 (7th Cir.1995) (upheld checkpoint whose purpose was to detect equipment violations and prevent uninsured and non-licenced motorists from operating on the highways); *United States v. O'Mara*, 963 F.2d 1288, 1291-92 (9th Cir.1992) (reasonable articulable suspicion not required when police utilized highway roadblock to stop all cars leaving national park in response to report of illegal firearms discharges); *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir.1995) (reasonable articulable suspicion not required to stop car at roadblock on public thoroughfare which was only visitor route to prison).

the official purpose of interdicting drug traffic is permissible under the Fourth Amendment, an examination of the various state and federal cases involving roadblocks whose purpose was, wholly or in part, to interdict narcotics reveals further support for our conclusion that the Indianapolis roadblocks are constitutional. Three categories of narcotics roadblocks emerge from those cases.

First is the narcotics roadblock whose stated purpose is to check motorists' driver's licenses and registrations, but whose actual purpose is to search for narcotics. These roadblocks are known as "pretext" roadblocks and often get struck down as unconstitutional. Typically, the problem with pretext roadblocks is that they leave too much discretion in the hands of the officers on the scene because the official guidelines do not cover the actual purpose, to wit, interdicting narcotics. *See United States v. Huguenin*, 154 F.3d 547 (6th Cir.1998) (pretext roadblocks provide too much discretion to officers on the scene); *Garcia v. State*, 853 S.W.2d 157 (Tex.Ct.App.1993) (driver's license checkpoint unconstitutional because it was a subterfuge for more general criminal investigation).

The second category includes narcotics roadblocks whose sole stated and actual purpose is to interdict narcotics. Few cases address this type of roadblock, but typically they are upheld because the official guidelines cover the narcotics purpose, thus limiting officer discretion. *See State v. Damask*, 936 S.W.2d 565 (Missouri 1996). The courts also recognize a compelling public interest in stopping the flow of illicit drugs. *Id.*

The third category includes narcotics roadblocks whose stated and actual purposes include searching for narcotics *and* checking licenses and registrations. These roadblocks are almost always upheld because, even assuming a roadblock for the sole purpose of interdicting narcotics is

invalid, another valid reason nevertheless exists for the checkpoint, to wit, license and registration checks. *See Merrett v. Moore*, 58 F.3d 1547 (11th Cir.1995) (holding that a mixed motive roadblock, used primarily to interdict drugs, but also to check driver's licenses and registration, was constitutional);[12] *State v. Everson*, 474 N.W.2d 695 (N.D.1991) (finding that a safety inspection checkpoint, the primary purpose of which was actually drug interdiction, to be constitutional); *but see Galberth v. United States*, 590 A.2d 990 (D.C.App.1991) (checkpoint for drugs and firearms unconstitutional).

The checkpoints in this case fall in the third category. They obviously are not "pretext" roadblocks since interdicting narcotics is one of their official purposes. In fact, both Defendants and Plaintiffs stress the primary purpose of the roadblocks as the interdiction of narcotics, suggesting that the checkpoints fall into the second category. However, a secondary purpose of the checkpoints is to check driver's licenses and vehicle registrations; thus, the checkpoints are more appropriately considered in category three. This distinction is important when considering the cases upon which Plaintiffs rely.

Plaintiffs cite the Sixth Circuit's recent decision in *United States v. Huguenin*, 154 F.3d 547 (6th Cir.1998), in which a narcotics checkpoint was declared unconstitutional. In that case, the police set up a checkpoint whose official purpose

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[12] The Eleventh Circuit in *Merrett* noted that "[n]o question is presented about whether a state can lawfully conduct a roadblock solely to intercept illegal drugs; and we leave that question open." *Id.* at 1551 n. 3.

was to review driver's licenses and registrations. The court, however, finding that the actual purpose of the checkpoint was to search for drugs, went on to hold that the checkpoint violated the Fourth Amendment because:

> The evidence indicates that when the purpose of a checkpoint is pretextual, the guidelines set up for its ostensible operation are not truthful and are not followed, and too large a degree of discretion is left to the officer in the field on the operation of the subterfuge.

Id. at 557.

The Sixth Circuit in *Huguenin* was obviously concerned about the amount of discretion given officers on the scene, since there were no guidelines governing their search for narcotics. That concern does not afflict the policies in the instant case, however. The IPD has made it clear that the purpose for its checkpoints is to interdict narcotics traffic and, accordingly, has structured the official checkpoint guidelines, which minimize officer discretion, around that purpose. Thus, Huguenin is inapplicable to the instant case.

Plaintiffs also cite *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992), in support of their position. Like *Huguenin*, the checkpoint in Morales-Zamora was ostensibly set up to check licenses and registrations. At trial, it was established that the actual and undisclosed purpose of the checkpoint was to interdict drug traffic, which became the issue on appeal. The legality of a checkpoint for narcotics was not raised since the government conceded that "under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car." *Id.* at 151. The Tenth Circuit concluded that the purpose of the checkpoint was to search

for narcotics and, given the government's concession, held the checkpoint unconstitutional.

Morales-Zamora does not help Plaintiffs. The Tenth Circuit did not analyze the question of whether the narcotics checkpoint was constitutional because the government had conceded that such a checkpoint would violate the Fourth Amendment. Accordingly, once the court determined that the checkpoint was a pretext for narcotics interdiction, it concluded without further discussion that the checkpoint was unconstitutional. In addition, the narcotics purpose in *Morales-Zamora* was secondary to the license/registration check, rather than being the official policy, unlike the instant case where the checkpoints' official purpose is to interdict drug traffickers and where the official guidelines limit officer's discretion in pursuing that goal.[13] In short, Morales-Zamora is distinguishable from the instant case based on differing factual and legal circumstances.

Accordingly, based on the *Brown* balancing test and consistent with the relevant case law, the IPD checkpoints pass constitutional muster and Plaintiffs' Motion for Preliminary Injunction must be and is *DENIED*. This ruling should not be construed as a judicial abandonment of the Fourth Amendment, by which courts permit any stop-and-search procedure which is instituted by law enforcement and

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[13] *See United States v. Galindo-Gonzales*, 142 F.3d 1217 (10th Cir.1998) (suggesting that a pretextual checkpoint for the actual purpose of searching for illegal aliens would be unconstitutional, even though it would be permissible if its *official* purpose were to search for illegal aliens).

is justified by the compelling circumstances our country faces in waging a war against drugs. We approve Defendants' use of checkpoints for drug interdiction, but only because the policy under which they are effected is sufficiently non-intrusive to justify their use. To be sure, a motorist's right to be free from unreasonable searches and seizures must not be trivialized or cavalierly sacrificed. Police actions must comport fully with Fourth Amendment standards, and when they do, they deserve to be upheld.

C) *INDIANA CONSTITUTION CLAIM*

Plaintiffs allege in their Complaint that, in addition to their shortcomings under the United States Constitution, the checkpoints also violate the Indiana Constitution's prohibition against unreasonable searches and seizures under Article 1, Section 11. Plaintiffs do not explicate this position in their Motion for Preliminary Injunction, relying only on a passing mention at the conclusion of their Reply Brief. This inadequate discussion undermines Plaintiffs' ability to establish its likelihood of succeeding on the merits of this claim.

The Indiana Supreme Court has frequently noted that "[s]eparate and apart from the federal Fourth Amendment analysis, the Indiana Constitution provides an independent prohibition against unreasonable searches and seizures under Article 1, Section 11." *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1152 (Ind.1997); *see also Moran v. State*, 644 N.E.2d 536, 540 (Ind.1994); *State v. Lamar*, 680 N.E.2d 540, 543 (Ind.Ct.App.1997). To date, however, the Indiana courts have not had occasion to address whether a checkpoint for the purpose of searching for narcotics is valid under the Indiana Constitution. *See State v. Garcia*, 500 N.E.2d 158 (Ind.1986) (upheld sobriety checkpoint under the Fourth Amendment, but did not address Indiana Constitution); *Covert v. State*, 612 N.E.2d 592 (Ind.App.1993) (same). We

decline Plaintiffs' invitation to attempt to answer this question on the limited and one-sided briefing now before us. Any, in any event, should today's ruling on Plaintiffs' federal claim become our final ruling on injunctive relief, we would, in all likelihood, determine that in the interests of judicial economy, convenience, fairness and comity, it is appropriate to relinquish our pendent jurisdiction over Plaintiffs' state law claim, per *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-351, 108 S.Ct. 614, 618-619 n. 7, 98 L.Ed.2d 720 (1988) and *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Accordingly, Plaintiffs' Motion for Preliminary Injunction based on the Indiana Constitution is *DENIED*.

IV. *CONCLUSION*

For all the aforereferenced reasons, Plaintiffs' Motion for Class Certification is *GRANTED*. However, Plaintiffs' Motion for Preliminary Injunction is *DENIED* because Defendants' policy and use of drug interdiction checkpoints do not violate the Fourth Amendment. Plaintiffs' claim under the Indiana Constitution is also *DENIED* based on their failure to establish a likelihood of success on its merits.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 18, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Diane P. Wood, Circuit Judge

JAMES EDMOND and JOELL PALMER, on their own behalf and on behalf of a class of those similarly situated,	)	
Plaintiffs-Appellants	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 98-4124 v.	)	
STEPHEN GOLDSMITH, in his official capacity as Mayor of the City of Indianapolis, Indiana; CITY OF INDIANAPOLIS, INDIANA; and UNKNOWN MEMBERS OF THE INDIANAPOLIS POLICE DEPARTMENT,	)	No. 98 C 1400
	)	Sarah Evans Barker, *Chief Judge*.
Defendants-Appellees.	)	

ORDER

On July 21, 1999, defendants-appellees filed a petition for rehearing with suggestion for rehearing *en banc* and on August 3, 1999, pl;aintiffs-appellants filed an answer. All the judges on the original panel have voted to deny* the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore **DENIED**.

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* Statement of Easterbrook, Circuit Judge, respecting the denial of rehearing en banc. The question presented by this case is an important and recurring one, but I have not called for a vote on the petition for rehearing en banc. The court's opinion shows that a conflict among the circuits (and state courts) preexisted the panel's opinion, and it would be pointless to sit en banc just to consider moving from one side of that conflict to another. Only a higher court can give a definitive answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES EDMOND, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. IP 98-1400 C B/S
	)	
STEPHEN GOLDSMITH, *et al.*,	)	
	)	
	)	
Defendants.	)	

STIPULATION OF THE PARTIES

Come now the parties, by their counsel, and file their Stipulation. The parties acknowledge that this Stipulation is not designed to settle this cause, but is designed to remove the factual issues so that the Court may decide the preliminary injunction request of the parties.

1. Attached to this Stipulation as Attachment 1 is the policy which is currently in effect concerning the drug checkpoints being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis.

2. The plaintiffs do not agree that this policy was applied to them. Nevertheless, the defendants agree that they will comply with the attached policy in the future and that they will also comply with the following addenda to the policy --

> - The City of Indianapolis will endeavor to operate the drug checkpoints in such a way that the total elapsed time that a vehicle is stopped, absent some probable cause or reasonable suspicion, is five minutes or less.

3. The City of Indianapolis intends to continue conducting the drug checkpoints pursuant to Attachment 1.

4. Statistics kept by the City of Indianapolis disclose that as of this date there have been six (6) checkpoints and 1161 vehicles have been stopped.

5. Attached hereto as Attachment 2 are statistics generated by the City of Indianapolis as a result of the checkpoints.

6. When the checkpoints are established the police stop a set number of vehicles and have them pass through the checkpoints as described in the attached document. Once a vehicle is selected to pass through the checkpoint the vehicle must pass through it.

7. There are approximately thirty (30) Indianapolis Police Department officers at the checkpoints. Police cars with mobile data terminals are present. When drivers are stopped, the officers ask for license and registration. If the driver does not possess a valid license and registration, then the information is run through the mobile data terminal in the adjacent police car.

/s/ jllegible
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317/635-4059

Attorney for Plaintiffs

/s/ illegible
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317/327-4055

Attorney for Defendants

DRUG CHECKPOINT CONTACT OFFICER
DIRECTIVES BY ORDER OF THE CHIEF OF POLICE

1. Upon approaching vehicle, ask driver for license and registration. Advise the citizen that they are being stopped briefly at a drug checkpoint.

2. Look for signs of impairment, conduct open view examination of vehicle from outside vehicle.

3. If you have articulatable reasons to reasonably believe the person might be armed, you should ask the person to exit the vehicle where a pat-down in conformance to the rule of *Terry v. Ohio* should be performed in an attempt to locate a weapon.

4. If you have an articulatable reason to reasonably believe the person might be armed, you may also search the passenger compartment of the vehicle for a weapon.

5. A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. A court will look at the totality of the circumstances to determine if the consent was given willingly and knowingly. If the person is in custody (beyond being stopped at the checkpoint), then Indiana law requires the person be warned of their right to counsel before giving consent to the police to search.

6. A warrantless search of the vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence or fruits of crime. Probable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable cause.

– ATTACHMENT 1 –

7. A vehicle in police custody which is to be towed may be inventories pursuant to General Order 9.02. The towing of a vehicle must be "reasonable" before a court will permit an inventory to be conducted.

8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE SAME MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.

9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, THE VERY NEXT SEQUENCE OF VEHICLES WILL BE STOPPED. NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.

1998 Drug Road Blocks

	#1 West 8/13	#2 West 9/21	#3 East 9/24	#4 South 9/29	#5 North 10/1	#6 East 10/6	Total
W/M	7	7	5	16	5	4	44
B/M	9	5	2	6	10	--	32
W/F	1	6	2	5	3	2	19
B/F	1	2	--	2	3	--	8
H/M	1	--	--	2	--	3	6
Total	19	20	9	31	21	9	109
Drug	13	12	2	16	9	3	55
Driving	4	8	7	14	10	6	49
Other	2	--	--	1	2	--	5
# of cars	200	210	220	228	214	89 (rain)	1,161

– ATTACHMENT 2 –

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES EDMOND, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. IP 98-1400 C B/S
	)	
STEPHEN GOLDSMITH, *et al.*,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF MARSHALL DEPEW

I, Marshall DePew, being first duly sworn under oath, state that I am a sergeant in the Indianapolis Police Department. If called upon to testify, my testimony would be as follows:

1. I have personal knowledge of the matters contained in this affidavit, I am over the age of 21 years, I am competent to testify and will testify to the information contained in this affidavit.

2. I am assigned to the West District and am one of the officers responsible for designing and implementing drug interdiction checkpoints.

3. Checkpoint locations are selected at the supervisorial level weeks in advance based on geographical suitability, taking into consideration area crime statistics and the ability to locate the checkpoint in a location which will minimize the interference with normal traffic flow and permit observation of traffic approaching the checkpoint. West District has so far chosen to perform its checkpoints during the day time from approximately 10:00 a.m. to 3:00 p.m., although this

may change in the future. Operation during daylight benefits officer safety, and this time period does not interfere with rush hour traffic. In my experience, drug traffickers are as likely to be on the road at this time as any other, so the checkpoints are as effective during this time as they would be at any other time of day.

4. The checkpoints are identified with lighted signs reading "NARCOTICS CHECKPOINT _ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." Marked IPD cards with flashers on are also present. The checkpoints are begun with predetermined number of cars being stopped. The rest of the traffic is allowed to proceed with no interruption until the stopped cars have all been initially processed and either allowed to proceed are diverted for further processing. When the last of the initially stopped cars has left, then the next group (of the same predetermined number) of vehicles is stopped for processing. There are no deviations from this sequencing permitted and under no circumstances are random stops permitted or utilized. Each vehicle in the predetermined number is stopped, without regard to the nature of the vehicle. If a police car, fire engine or ambulance happens to be in the group, than that vehicle is processed in exactly the same fashion as all other vehicles.

5. The stopped cars are met by a team of officers, at least one of whom is in full uniform. The driver is asked for license and registration and informed that he or she has entered a narcotics checkpoint. At this time, a drug detection dog is walked around the exterior of the vehicle. If the license and registration are present and valid, and there is no probable cause presented by the officer's plain-view, plain-smelling examination or a dog alert, then the motorist proceeds without any further delay. We attempt to accomplish this in as little time as possible. In my experience, the average stop is in the two-to-three minute range or less for a vehicle not subject to further processing.

Because no vehicles are stopped until the processing of the prior vehicles has been completed, there is no back-up to traffic flow caused beyond that which may occur under any circumstances at these locations. In the event that a traffic back-up did somehow occur, we would either suspend operation of the checkpoint or institute traffic control measures until the back-up had cleared.

6. If no valid license is present, then the driver's name is run through the mobile data terminal located in the police vehicles at the checkpoint to determine if the driver has a valid license and if there are any outstanding warrants for that individual. This check may take an additional 15 seconds to two minutes.

7. In the event that there are outstanding warrants or that a plain-view, plain-smell examination or dog alert give rise to probable cause, then the driver and vehicle are subject to further processing in exactly the same manner as would be the case in any other circumstance.

8. At the first roadblock conducted, we apprehended a major trafficker in possession of 20 pounds of marijuana. There is no reason to believe he would have been detected absent the roadblock.

Further affiant sayeth not.

/s/ illegible
Marshall DePew

[Notarization omitted]